Nos. 01-593, 01-594

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOLE FOOD CO., ET AL.,

Petitioners,

v.

GERALDO DENNIS PATRICKSON, ET AL.,

Respondents.

DEAD SEA BROMINE CO., LTD., ET AL.,

Petitioners,

v.

GERALDO DENNIS PATRICKSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondents Geraldo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera respectfully submit this consolidated Brief in Opposition to the Petitions for Writ of Certiorari in Nos. 01-593 and 01-594.

According to petitioners, this case presents a question concerning the scope of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11: Whether FSIA immunity extends to every subsidiary in a corporate chain, no matter how remote, so long as the subsidiary can be deemed to be majority-owned by a foreign state by means of a process of multiplying indirect shareholder stakes. In this case, the Ninth Circuit, per Kozinski, J., properly held that the FSIA's ownership test applies only to the first tier of direct corporate ownership by a foreign state.

There are four reasons that the Ninth Circuit's judgment is not suitable for this Court's review:

First, this Court denied review of the very same issue only very recently, on April 16, 2001, in *Delgado v. Shell Oil Co.*, No. 00-1316, 121 S. Ct. 1603 (2001). Tellingly, the respondents in *Delgado* were the very same parties who are petitioners here, represented by the very same counsel.[1] Yet in *Delgado* they urged this Court to *deny* review of the very same question they now present to this Court. Nothing that has happened since this Court denied review in *Delgado* makes the question presented any more worthy of this Court's review.

Second, this Court should deny review because any conflict among the lower courts with respect to the question presented would benefit immensely from additional percolation. For

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[1] By contrast, neither the respondents in this case nor their counsel were involved in the certiorari petition in *Delgado*.

example, the vast majority of the decisions addressing the question presented have been rendered by district courts rather than courts of appeals. Some circuits do not have settled views on the issue. For example, district courts in the Second, Third, and Fourth Circuits have expressed intra-circuit disagreement on the question. Although the Dole defendants claim that the Ninth Circuit's judgment below conflicts with decisions in four circuits, the Dead Sea Companies acknowledge that "the Fifth and Seventh Circuits are the only circuit courts [in addition to the Ninth] to have analyzed the issue at any length." Petition in No. 01-594 at 19.

Third, this Court should deny review because the case at bar is a particularly poor vehicle for addressing the question presented. It is undisputed that the government of Israel privatized its interest in the Dead Sea Companies beginning in the early 1990s and no longer owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies at the time of this litigation. Pet. App. 19a. As a result, the issue presented by the this case is not the FSIA question framed by petitioners but rather the separate question of whether FSIA immunity extends to an indirect subsidiary that was allegedly majority-owned by a foreign government at the time of the underlying wrongdoing supposedly giving rise to the litigation, but not at the time of the complaint or removal petition. In addition, there is a fraudulent joinder issue in this case that would prevent removal even if the Dead Sea Companies were deemed a foreign "state."

Fourth, this Court should deny review because the Ninth Circuit's interpretation of the FSIA is demonstrably correct.

STATEMENT

1. Background

On October 3, 1997, Plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the

State of Hawaii. Pet. App. 57a.[2] Plaintiffs' complaint, as amended on March 3, 1998, was filed by nine foreign Plaintiffs who are residents of the countries of Costa Rica, Ecuador, Guatemala, and Panama. Each of the Plaintiffs in these cases was injured while working on banana plantations in Latin America by a dangerous chemical that has been banned in the U.S. but that Defendants have continued to export. *Id.* at 4a.

Defendants caused Plaintiffs' injuries by exposing them, without their knowledge, to dibromochloropropane (DBCP), a pesticide used for controlling nematodes. DBCP causes male sterility, testicular atrophy, testicular and other cancers, miscarriages in women, mutation of sperm cells in men, damage to the liver and kidneys, and injury to retinal and corneal tissue. The U.S. Environmental Protection Agency (EPA) has identified DBCP as a probable human carcinogen. The National Cancer Institute (NCI) has described it as "one of the most potent known carcinogens." As early as 1958, an in-house toxicology report at Dow Chemical Co. concluded that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow's data also showed that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged, repeated exposure."

DBCP was widely used throughout Central America beginning in the 1960s without warnings, safety equipment, or precautions. Workers at banana plantations (including Plaintiffs) suffered from regular, heavy exposure to DBCP through vapor inhalation and skin absorption.

In July 1977, thirty-five of 114 male workers at Occidental's California DBCP manufacturing plant were found to be sterile. Almost immediately, EPA suspended all but a few uses of

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[2] Unless otherwise indicated, citations are to the appendix in No. 01-594, *Dead Sea Bromine Co. v. Patrickson*.

DBCP, for which heavy protective equipment was required (none of which was supplied to Plaintiffs). Despite this ban, U.S. companies continued to use DBCP in unsuspecting developing nations unchecked by export restrictions. Pet. App. 4a.

2. The Dead Sea Companies

The Dead Sea Companies were never owned directly by the Israeli government. Pet. App. 22a. Rather, "at all relevant times, the chain of ownership included intermediary corporations." *Id.* at 65a. Between 1968 and 1995, the Companies were second-tier, third-tier, or fourth-tier members of a corporate chain that was indirectly owned by the government. *Id.* For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea Bromine Co., Ltd. ("Dead Sea"). *Id.* Dead Sea owned 50% of Bromine Compounds Limited ("BCL"), and Dead Sea Works owned 25% of BCL. *Id.* After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals, Ltd., an Israeli corporation owned by the State of Israel. In short, "[a]ny ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times." *Id.*

Moreover, in the early 1990s the government of Israel privatized the companies in question. "At the time suit was filed, Israel was only a minority shareholder of the Dead Sea Defendants." Pet. App. 62a.

The Dead Sea Companies claim to have had business relationships with the first-party Defendants in this case, and those Defendants have asserted a third-party claim against the Dead Sea Companies. Yet the Dead Sea Companies have never provided any evidence of when or where their DBCP was used (if ever), nor have they shown that any Plaintiff was exposed to their DBCP.

On October 31, 1997, the Dead Sea Companies filed their Petition for Removal. This Petition was allegedly premised on a third-party complaint filed two hours earlier on the same day by the Dole defendants against the Dead Sea Companies. Pet. App. 58a. The removal petition was filed despite clear and unambiguous disclaimers in Plaintiffs' complaint specifically denying claims for exposure to DBCP made by the Dead Sea Companies. In addition, the Dead Sea Companies have already settled the third-party claims and have denied any liability for contribution or indemnity claims.

3. The District Court's Decision

The district court denied the Dead Sea Companies' assertion of FSIA jurisdiction. In a memorandum opinion and order dated September 9, 1998, the court held that the Dead Sea Companies were not agencies or instrumentalities of Israel.

The court began by accepting Defendants' view that the proper time for ascertaining FSIA foreign state status is the time the alleged wrongdoing occurred. Pet. App. 62a-64a. But the court concluded that "Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state." *Id.* at 71a.

The district court reached this result through a straightforward application of the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995), and properly concluded that indirect ownership by a foreign state through subsidiary entities does not entitle a company to be considered an agency or instrumentality of a foreign state. The district court analyzed *Gates* in great detail, observing that it is "the most recent Ninth Circuit decision which discusses the requirements of agency or instrumentality

status." Pet. App. 65a. In *Gates*, the Ninth Circuit explained that the FSIA applies only to "entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision," and it rejected the "tiering" theory that potential immunity could extend to "every subsidiary in a corporate chain, no matter how far down the line." 54 F.3d at 1462.

The district court further noted that subsequently, in *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the Ninth Circuit reaffirmed the language from *Gates* and explained that: "the ownership test of § 1603(b)(2) applie[s] only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by 'a foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." 89 F.3d at 655 (citation omitted).

The district court considered evidence submitted by the parties and found that "Dead Sea and BCL are commercial mining operations concerned with production, marketing, and profit." Pet. App. 78a. "The control maintained by the government was derived mainly from the government's indirect ownership of the entities." *Id.* "[T]he government's control is not derived from the need to play an active supervisory role over a government created entity." *Id.* The Dead Sea Companies "were not created by the government to fulfill a government mission." *Id.* Moreover, the district court noted that "the entities are not staffed solely with government employees and are not treated as agencies under Israeli law." *Id.*

Accordingly, the district court held that the Dead Sea Companies could not qualify as "agencies or instrumentalities" under the FSIA and that removal under the FSIA was improper. Because it reached this conclusion, the district court had no occasion to reach Plaintiffs' alternative argument that the Dead

Sea Companies had been fraudulently joined. Pet. App. 79a n.5.

On September 21, 1998, the Dead Sea Companies filed a reconsideration motion arguing that they were agencies or instrumentalities of Israel. Again, the district court carefully considered the Dead Sea Companies' argument and rejected it. The court explained that "Dead Sea has not alleged any facts or additional information that would allow the Court to change its decision. No intervening change in the law is argued and no new evidence has been produced." Pet. App. 53a.

4. The Court of Appeals' Decision

The Ninth Circuit affirmed the district court's holding with respect to the Dead Sea Companies, in a unanimous opinion authored by Judge Kozinski. Like the district court, the Ninth Circuit relied on a straightforward application of *Gates*: "Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership." Pet. App. 22a. "*Gates* decided this question, and we are bound by its authority." *Id.* at 24a.

The Ninth Circuit also observed that "the Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel." *Id.* at 25a-26a. "These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.* at 26a.

REASONS FOR DENYING THE WRIT

A. This Court Recently Denied Certiorari in *Delgado*

The same FSIA question presented here was the subject of a petition for certiorari in *Delgado v. Shell Oil Co.*, No. 00-1316, 121 S. Ct. 1603 (2001), which involved DBCP lawsuits against

the same defendants (including the Dead Sea Companies), represented by the same counsel. On April 16, 2001, this Court denied review in *Delgado*. Nothing has changed in the interim to warrant this Court's review of the FSIA question.

The only difference between *Delgado* and this case is that the Fifth Circuit ruled in defendants' favor in *Delgado*, and accordingly defendants opposed certiorari in that case. Yet the arguments made by defendants in *Delgado* contradict their arguments in favor of certiorari here. In *Delgado*, for example, the Dead Sea Companies contended that there was no circuit split warranting this Court's review. Br. in Opp. of Resp. Dead Sea Bromine Co., et al., in No. 00-1316, at 4 ("[T]he Fifth Circuit's decision does not create a split with the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.) ('*Gates*'), *cert. denied sub nom.*, 516 U.S. 869 (1995)."); *id.* at 5 ("Although several district courts have indicated that they perceive a split between the Ninth Circuit's decision in *Gates* and one aspect of the Seventh Circuit's interpretation of the FSIA in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 939-41 (7th Cir. 1996) ('*Air Crash*'), the specific FSIA issue as to which the Ninth and Seventh Circuits appear to disagree is not presented by Dead Sea Bromine's claim to FSIA status."). In *Delgado*, the Dole defendants similarly insisted that "there is no conflict between the decision below and *Gates*." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 9.

As the Ninth Circuit observed in this case, its decision below is a straightforward application of its prior opinion in *Gates*. *See* Pet. App. 22a ("Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership."); *id.* at 23a (Dead Sea's argument is "foreclosed by *Gates*"); *id.* ("*Gate's* holding covers the Israeli government's interest in the Dead Sea Companies"); *id.* at 24a ("*Gates* decided this question, and we are bound by its authority"). The decision below, which relies entirely on *Gates*, does not break any new

ground requiring this Court's review. Accordingly, the defendants' argument against review in *Delgado* cannot be squared with their petitions for certiorari here.

Moreover, in *Delgado* the Dole defendants insisted that "both practical and policy considerations weigh against granting certiorari and prolonging this already protracted case even further." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 9. The same reasoning strongly supports denial of certiorari here. This case was filed more than four years ago in Hawaii state court. Pet. App. 57a. Since that time, the plaintiffs have not been afforded any proceedings of substance on the merits of their claims, in either state or federal court. Instead, the defendants have delayed meaningful justice through a flurry of jurisdictional, procedural, and other motions. It is long past time when this case should have gone to trial. This Court should promptly deny review and allow the Hawaii state courts to proceed with this case on remand.

At stake not only is justice for these plaintiffs. The integrity of this Court's certiorari process is also implicated here. Defendants' arguments against review in *Delgado* contradict their petitions for certiorari here. "Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdich*, 530 U.S. 211, 227 n.8 (2000). This elementary principle requires the denial of the petitions at bar.

B. The Issue Should Percolate Further in the Lower Courts

Petitioners' claim of an extensive circuit split is greatly exaggerated. In fact, the Dead Sea Companies (in No. 01-594) and the Dole defendants (in No. 01-593) do not even among themselves as to the extent of the disagreement in the lower courts. The Dole defendants claim that the decision of the Ninth Circuit below "conflicts with the decisions of at least four other

courts of appeals." Petition in No. 01-593, at 11. Yet the Dead Sea Companies acknowledge that "the Fifth and Seventh Circuits are the only circuit courts [in addition to the Ninth] to have analyzed the issue at any length." Petition in No. 01-594 at 19. And the Dead Sea Companies make that assertion even though their Brief in Opposition in *Delgado* argued precisely the opposite and demonstrated that there was *no* conflict among the Fifth Circuit's decision in *Delgado*, the Seventh Circuit's decision in *Air Crash*, and Ninth Circuit's decision in *Gates*, which the court of appeals below merely reaffirmed. *See* Br. in Opp. of Resp. Dead Sea Bromine Co., et al., in No. 00-1316, at 4-5, 12-14 (arguing that there was no conflict among the Fifth, Seventh, and Ninth Circuits).

The Dole defendants inflate their claim of a circuit split by including in their list of supposedly conflicting cases the Sixth Circuit's decision in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), and the D.C. Circuit's decision in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982) – even though neither the Sixth Circuit nor the D.C. Circuit expressly addressed the FSIA question presented by this case. Those courts simply assumed, without analysis, that indirectly owned corporate subsidiaries could qualify for FSIA immunity. Hence, the decisions in *Gould* and *Gilson* cannot be said to conflict with the judgment of the Ninth Circuit in this case. Nor can any genuine conflict be deemed to exist based on other decisions cited by the Dole defendants in which courts assumed that indirectly owned corporations could qualify for FSIA immunity or in which the parties did not raise the issue. *See* Dole Petition in No. 01-593, at 13-14 (citing cases in which the parties did not place the question in dispute).

As the Dole defendants argued in successfully opposing certiorari in *Delgado*, any conflicts in the lower courts "may work themselves out as the courts of appeals address the question of indirect ownership." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 15. The reality is that the overwhelming

majority of the cases addressing the FSIA question presented have been district court decisions rather than opinions by the courts of appeals. *See* Dead Sea Petition in No. 01-594, at 12-14 (citing two decisions by the courts of appeals and ten decisions by the district courts).

It is clear that the matter would benefit enormously from further percolation. As the Dead Sea Companies' Petition reveals, district courts in the Second, Third, and Fourth Circuits have reached different conclusions regarding the FSIA question presented. *Compare* Dead Sea Petition in No. 01-594, at 12-14, with *id.* at 16. Hence, those circuits have not yet adopted a consistent position on the FSIA question. If the petitioners are right that the FSIA question is an important and recurring one, then there will be additional opportunities for the courts of appeals to address the question and further opportunities for this Court to resolve any resulting conflicts among the circuits.

C. This Case Is An Unsuitable Vehicle To Review the Question Presented.

Even if the question presented were worthy of this Court's review, this Court should deny certiorari because the case at bar is a particularly poor vehicle for addressing the question presented.

The Dead Sea Companies are atypical FSIA subsidiaries because they were *not* majority owned by the State of Israel – either directly *or* indirectly – when the suit was filed in Hawaii state court on October 3, 1997 or when the case was removed to federal court later that month. Pet. App. 62a. Rather, the State of Israel unwound its indirect investment in the Dead Sea Companies in the early 1990s. As the Ninth Circuit explained, "[t]he Israeli government privatized most of its holdings in Israel Chemicals Limited during the 1990s and so, by the time this suit was filed in 1997, the govemment no longer owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies." Pet. App. 19a. As a result, the issue presented by the specific

circumstances of this case is not the FSIA question framed by petitioners but rather the question of whether FSIA immunity extends to an indirect subsidiary that was allegedly majority-owned by a foreign government not at the time of the complaint or removal petition but only at the time of the underlying wrongdoing giving rise to the litigation. In the words of the Ninth Circuit, "[d]oes the FSIA apply to companies that were owned by the state at the time of the allegedly tortious conduct, but have since been cut free?" *Id.*

By itself, the fact that the Dead Sea Companies are not typical FSIA subsidiaries would be enough to deny certiorari. The problem is compounded by the Ninth Circuit's recognition that there is a "plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer." Pet. App. 21a. The FSIA is not ambiguous. The FSIA repeatedly uses the present tense in defining an "agency or instrumentality of a foreign state" as an entity "which *is* a separate legal person"; "which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares . . . *is* owned by a foreign state or political subdivision thereof," and "which *is* neither a citizen of a State . . . nor created under the laws of any third country." 28 U.S.C. § 1603 (emphasis added). As the Ninth Circuit observed, "[b]y its terms, the FSIA applies only to an entity that 'is' a foreign state at the time of the suit." Pet. App. 20a (quoting 28 U.S.C. § 1603(b)(2)). "The statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so." *Id.* "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992) (deriving the meaning of the statute from Congress' use of "verbs in the past and present perfect tenses") (citations omitted).

Moreover, the FSIA "contains special rules for service of process on the foreign state, § 1608, and for enforcing a

judgment against the foreign state, §§ 1609-10," Pet. App. 20a – provisions that make sense only if the entity being sued is a foreign state at the time of suit. The Ninth Circuit concluded: "We have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." *Id.* Thus, it seems clear that, even if indirect subsidiaries would generally be entitled to immunity under the FSIA, the Dead Sea Companies are *not* protected by the FSIA. In any event, the mere uncertainty over that issue is enough to deny certiorari of the question presented by petitioners.

In addition, there is a further reason that this case is an inappropriate vehicle for addressing the question presented: the Dead Sea Companies were fraudulently joined to the litigation and the FSIA cannot serve as a basis for removal in this case – regardless of the outcome of the question presented. The Plaintiffs were not exposed to products manufactured by the Dead Sea Companies and made clear, to a legal certainty, that they could not legally recover any damages from the Dead Sea Companies. The Plaintiffs, in their complaint, specifically disavowed any intention to seek recovery for any exposure to DBCP manufactured by the Dead Sea Companies:

> Plaintiffs do not assert any claims, do not seek any damages, and expressly disclaim any recovery for any injuries arising out of exposure to DBCP or products containing DBCP designed, manufactured, marketed, or supplied by Dead Sea Bromine Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel, or any other foreign sovereign entity.
>
> No Plaintiff in this action claims exposure to DBCP manufactured, sold, distributed, supplied, or designed by Dead Sea Bromine, Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel

> (collectively "Dead Sea"), or any other foreign sovereign entity. Discovery in other DBCP cases has shown conclusively that no Dead Sea DBCP product was ever used by Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc., or Del Monte Fresh Produce, N.A., or their affiliates, and that no such product was used by Defendant Standard Fruit Company or its affiliates prior to 1975. Accordingly, any plaintiff who did not work for Standard Fruit Company or its affiliates after 1975 has no possibility of exposure to any Dead Sea product. Any Plaintiff who worked for Standard Fruit Company or its affiliates specifically and affirmatively disclaims any right to recovery for such exposure.

Complaint at ¶¶ 23; 24. In each cause of action in the complaint against the Defendants, the Plaintiffs specifically repeated that the Plaintiffs "assert [such] claims against only those Defendants named in this Complaint." The district court did not need to reach the fraudulent joinder issue because it found that the Dead Sea Companies were not entitled to FSIA immunity in any event. Pet. App. 79a n.5. Yet it could not be clearer that the Plaintiffs, to a legal certainty, have no right to recovery against the Dead Sea Companies.

In their brief before the Ninth Circuit, the Dead Sea Companies stated that they have already resolved any third-party claims against them by the Dole defendants or other parties, so that there is no possibility of indemnity or contribution claims against the Dead Sea Companies. *See* Reply Br. of Dead Sea Companies at 27 n.1.

In short, nothing in this case could affect the liability of the Dead Sea Companies. It is clear from defendants' procedural machinations that the Dead Sea Companies have been fraudulently joined in a blatant effort to obtain federal jurisdiction. On October 31, 1997, the Dead Sea Companies filed their Petition in the United States District Court, with

lengthy attached documentation, at 2:00 p.m., little more than two hours after the Dole defendants filed the third-party complaint. Thereafter, the Dead Sea Companies filed their notices of removal in state court on October 31, 1997 at 2:01 p.m. and at 2:12 p.m. The defendants colluded in carefully choreographing the fraudulent joinder of the Dead Sea Companies in order to obtain a federal forum.

The fraudulent joinder issue provides yet another reason to deny certiorari.

D. The Ninth Circuit's Interpretation of the FSIA Is Demonstrably Correct.

Review should be denied for the further reason that the Ninth Circuit's interpretation of the FSIA is entirely proper. Section 1603(b)(2) requires that a corporation attempting to invoke the benefits of the FSIA by qualifying as an "agency or instrumentality of a foreign state" must have a majority of its shares owned by "a foreign state or political subdivision thereof." Thus, the *only* shares of a corporation (here, the Dead Sea Companies) that count toward the majority-ownership requirement of Section 1603(b)(2) are those shares held by the foreign state itself (here, for example, the Government of Israel) or by its political subdivisions. Shares of a corporation such as Dead Sea that are owned *not* by "a foreign state or political subdivision thereof," but instead by *another corporation* (which is the case here), do not count — even if the parent corporation happens to be the instrumentality of a foreign state or political division thereof because a majority of *its own shares* are owned by that foreign state or political subdivision. The plain language of Section 1603(b)(2) requires this result because it fails to list as relevant under Section 1603(b)(2) shares that are merely held by *instrumentalities* of foreign states.

The FSIA provides that a foreign state "*includes*" an agency or instrumentality, § 1603(a), not that it *is* an agency or instrumentality or that it *is defined as* an agency or

instrumentality. The primary definitions of the word "include" support this commonsense view. *See Webster's Third New International Dictionary of the English Language Unabridged* 1143 (3d ed. 1986) ("include": "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). Section 1603(a)'s "includes" language does not authorize the conclusion that a corporation that happens to be an instrumentality of a foreign state actually *is* a foreign state, so as to permit infinite "tiering" under Section 1603(b)(2).

Moreover, the meaning of the term "foreign state" in Section 1603(b)(2) is necessarily quite narrow because, by definition, it can only mean an entity that is *capable* of having "a political subdivision thereof." § 1603(a). Just as obviously, if the term "foreign state" in Section 1603(b)(2) were construed as meaning, from the very beginning, everything listed in Section 1603(a), then political subdivisions would already be encompassed in the term and the reference in Section 1603(b)(2) would become superfluous, in violation of well-accepted principles of statutory construction.

The Dead Sea Companies concede that the government of Israel has never owned a majority of their stock, but they contend that indirect tiering arrangements are a form of "other ownership interests" for purposes of § 1603(b)(2). Dead Sea Petition, in No. 01-594 at 20. They urge this Court to look beyond "corporate form" and focus on effective "control[]." *Id.* at 21, 22. This is not the test enacted by Congress. The FSIA could have prescribed a test based on "direct or indirect" ownership or "control." But it did not. Instead, Congress in the FSIA was exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. As the Ninth Circuit held, Pet. App. 23a, Section 1603(b)(2)'s reference to "other ownership interests" is plainly not a reference to forms of indirect, inchoate means of corporate control, but to forms of securities like stock, such as convertible bonds, partnership

interests, fractional interests in leases or assets, and the like. The Dead Sea Companies ignore the principle of *ejusdem generis*, under which the phrase "other ownership interests" must be construed with an eye to the example of "shares" provided by Congress.

If there were any doubt on the matter, a narrow view of the FSIA is required by the established rule that federal jurisdictional statutes should be construed narrowly. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

There are also important pragmatic concerns. The Ninth Circuit's interpretation of the FSIA creates a bright-line rule requiring direct ownership that avoids the need to consider lengthy chains of corporate ownership and to resolve potentially complex factual disputes over respective shareholder ownership percentages. In many cases, such inquiries will require extensive discovery, evidentiary hearings, and even consideration of foreign corporate law. The Ninth Circuit's approach offers a much simpler and more judicially administrable test.

This case illustrates the practical problems with the Dead Sea Companies' construction of the FSIA. The Dead Sea Companies have a complex and tortuous corporate history that would generate significant judicial burdens in the event of factual disputes.[3] The Dead Sea Companies themselves admit that the

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[3] From approximately 1965 to 1975, the parent corporation of the subsidiaries who are sued as defendants, Defendants Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL"), was a company called Dead Sea Works, Ltd. Through various stock transfers over the years, this parent itself became a subsidiary to another corporation. Defendant BCL was itself a subsidiary of Dead Sea and therefore a lower tier subsidiary of Dead Sea Works, Ltd.

From 1965 to 1966, the State of Israel owned approximately 45% of Dead Sea Works, Ltd. By 1967, Israel increased its ownership to approximately 98%. SER 750. From 1968 to 1975, Israel owned approximately 99% of the shares in The Works. In 1975, Israel conveyed all of its shares in Dead Sea Works to Israel Chemical, Ltd. ("ICL"). *Id.* Thus,

percentages of the Israeli government's indirect ownership interest have "fluctuated" over the years. Dead Sea Petition, in No. 01-594, at 7. This example illustrates the superiority of the Ninth Circuit's approach, which imposes a bright-line requirement of direct ownership and obviates the need to trace

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ICL became the new parent and Dead Sea Works a second-tier subsidiary.

From 1975 to 1977, ICL owned approximately 98% of the shares in Dead Sea Works. By 1983, ICL had reduced its ownership to 88% of Dead Sea Works shares. *Id.* Until 1995 ICL was owned by Israel when Israel divested itself of its majority ownership.

Defendant Dead Sea was incorporated in 1955 under the laws of Israel. SER 738. From 1965 to 1986, all of the shares of Dead Sea were owned by The Works, except for one share which was owned by Israel. SER 754. In 1986, this one share of Dead Sea was transferred to ICL and four ICL subsidiaries to be held in trust for Dead Sea Works. Dead Sea Works continued to own the remaining shares of Dead Sea. *Id.* In or about February, 1992 Israel converted its one share of ordinary stock into one share of special state stock.

In February 1995, Dead Sea Works distributed all of its shares of Dead Sea to its own shareholders. Dead Sea was then owned by ICL and the public, with 89% and 11% held respectively. *Id.* Thus, Dead Sea at all times was a second or third-tier subsidiary of Dead Sea Works or ICL.

Defendant BCL was incorporated under the Laws of Israel in 1961. From 1965 to 1969, Dead Sea owned 50% of the ordinary shares and one management share of BCL. The remaining 50% of BCL was owned in equal shares by two separate unrelated corporate entities. *Id.* In late 1969 or early 1970, Dead Sea Works acquired 25% of the ordinary shares of BCL from one of the separate unrelated corporate entities. *Id.* From late 1969 or early 1970 to 1981, Dead Sea owned 50% of the ordinary shares and one management share of BCL. Dead Sea Works owned 25% of the ordinary shares of BCL and the remaining 25% of ordinary shares were owned by an unrelated entity, Makhteshim, a New York corporation which sold pesticides in the United States. *Id.*

In 1981, Makhteshim transferred its 25% of ordinary shares to Dead Sea Works. BCL's ordinary shares were owned equally by Dead Sea Works and Dead Sea. *Id.* In 1984, Dead Sea Works transferred all of its shares to Dead Sea and Dead Sea transferred one share to ICL. *Id.* In 1992, Israel acquired one special state share in BCL. *Id.* Thus, beginning in 1986, BCL was a wholly owned subsidiary of Dead Sea and therefore a third and fourth-tier subsidiary under the parents Dead Sea Works and then ICL. *Id.*

indirect shareholder interests as they change over time in complex corporate transactions.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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